

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BUCK HALL, a/k/a EDWARD CYRUS HALL,
a/k/a JALEN BARNES,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 268811

Wayne Circuit Court

LC No. 05-009087-01

Before: Zahra, P.J. and Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of armed robbery, MCL 750.529, carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant Daryl Davis testified that as he was exiting his car at home, a man came from the side of a nearby house. The man pointed a shotgun at Davis and stole his money and vehicle. His assailant wore a scarf to cover part of his face, but Davis testified that he knew defendant because the scarf was transparent, and defendant was a friend of Davis' cousin. Davis had known defendant for approximately one year, had seen him many times, and recognized his voice. Davis asked defendant why he was robbing him, and defendant removed the scarf and threatened to kill Davis' cousin.

Defendant's girlfriend testified that the robbery occurred during the week of her daughter's birthday. She remembered that defendant was home with her every night, and went to work every day of that week.

Defendant first maintains that he was denied the effective assistance of counsel when counsel advised him not to testify. This issue is not preserved for appeal because defendant neither moved for a new trial nor a *Ginther*¹ hearing in the trial court. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). We may review this issue where the record is

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

sufficiently detailed to support defendant's claim even where defendant fails to move for a new trial or a *Ginther* hearing. *Id.* at 74. However, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Ineffective assistance of counsel is a mixed question of law and fact. Any findings of fact are reviewed for clear error, while the ultimate constitutional issue is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy. *Id.* To show prejudice, the defendant must establish a reasonable probability that the result of the proceeding would have been different if not for counsel's errors. *Id.* at 302-303.

Whether a defendant testifies is a strategic decision best left to defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant maintains that his decision to waive his constitutional right to testify was based upon his counsel's erroneous advice that the prosecution could cross-examine him regarding his use of aliases and the fact that he was on parole. However, defendant has not presented an affidavit or other evidence to support his claim that his counsel actually provided incorrect advice to him. In addition, defendant supplies no affidavit or offer of proof to indicate what his testimony would have been absent the erroneous advice of counsel. Moreover, given the strong identification evidence from someone who knew defendant, it is highly doubtful that any further alibi evidence from defendant would have changed the verdict. Under the circumstances, we find that defendant has failed to demonstrate that he was deprived of a substantial defense, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), and thus has failed to show he was provided ineffective assistance.

Defendant next argues that the prosecutor presented insufficient evidence to support his convictions for felon in possession of a firearm and felony-firearm. He contends that the prosecutor did not establish beyond a reasonable doubt that the device he used to rob complainant was a firearm within the definition of MCL 8.3t. He asserts that the prosecutor failed to establish the caliber of the weapon, the means of propulsion of any projectile or the specific characteristics of the barrel.

We review a claim of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

MCL 8.3t provides:

The word "firearm", except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any

smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas or air.

Complainant repeatedly testified that defendant pointed a shotgun at him. He recognized the weapon as a shotgun because of the way defendant cocked it. This description differed from the complainant's earlier statement to the police in which he described the weapon as an AK-47 type assault rifle, a distinction that defense counsel made much of during closing arguments. However, whether the jury believed the weapon used was a shotgun or an assault rifle, defendant's argument is without merit. Viewing the evidence in a light most favorable to the prosecution, sufficient evidence existed from which a rational trier of fact could conclude that defendant was carrying a firearm as defined in MCL 8.3t; therefore, defendant is not entitled to relief on this issue.

We affirm.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens